CRIMINAL YEAR SEMINAR

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Webinar

DUI Update

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2019-2020 DUI UPDATE

Presented By

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28–672(G) Causing serious physical injury or death by a moving violation—Limitation on restitution.

Patel, 247 Ariz. 482, 452 P.3d 712 (Ct. App. 2019): Superior court applied limitation in subsection (G) and reduced restitution award to $10,000.

.010 To the extent this subsection limits a victim's right to restitution, it conflicts with the Victim's Bill of Rights and therefore is unconstitutional.

¶¶ 2–15: Court reversed and reinstated award of $61,191.99 as ordered by municipal court.

2

28–1321(A) Implied consent—Implied consent to submit to test.

.020 Informing a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance" makes any subsequent consent involuntary.
State v. Weakland, 246 Ariz. 67, 434 P.3d 578, 1, 6–20 (2019).

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.030 Informing a driver (1) that "Arizona law states that a person who operates a motor vehicle at any time in this state gives consent to a test or tests of blood, breath, urine or other bodily substances"; (2) the officer is authorized to request more than one test and may choose the types of tests; (3) what will happen if the test results are not available or indicate a certain alcohol concentration; (4) the consequences of a refusal or unsuccessful completion the tests; and (5) then asking if the person will submit to the tests does not make any subsequent consent involuntary.
State v. De Anda, 246 Ariz. 104, 434 P.3d 1183, ¶¶ 1, 8–15 (2019).

4

Diaz v. Bernini, 246 Ariz. 114, 435 P.3d 457 (2019): Diaz was arrested for DUI and took a **breath** test. She contended her consent to take the test was not voluntary.

.050 The Fourth Amendment does not require suppression of **breath**-test results because a warrantless **breath** test is allowed as a search incident to a lawful DUI arrest, thus the state need not establish that the suspect voluntarily consented to the test.

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¶¶ 6–8: Diaz was administered warrantless **breath** test after her arrest for DUI, lawfulness of which she did not contest; test results were therefore admissible under Fourth Amendment regardless of whether her consent was voluntary.

.060 Under Arizona's implied consent statute, a law enforcement officer may obtain a **blood** or **breath** sample from a person arrested for driving under the influence only if the arrestee expressly **agrees** to the test; apart from any constitutional considerations, the statute itself does not require that the arrestee's **agreement** be voluntary.

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¶¶ 10–17: Court held word **"consent"** in subsection (A) was not same as word **"agree"** in subsection (B), thus held statutory requirement of express **agreement** to testing did not equate to or necessarily imply a voluntary **consent** requirement; court noted voluntary **consent** (or exigent circumstances) was required under the Fourth Amendment only for blood tests.

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28–1383(A)(3) Aggravated DUI—person under 15 years of age in vehicle.

Gomez, 246 Ariz. 237, 437 P.3d 896 (Ct. App. 2019): Gomez crashed his car while driving a 14-year-old girl home from party; he did not know her well and did not know how old she was; Gomez contended trial court erred in refusing his request to instruct jurors that state must prove he knew his passenger was younger than 15.

8

.020 For the offense of aggravated driving while under the influence with a passenger under 15 years of age, the defendant's ***knowledge*** of the passenger's age is not an element of the offense that the state is required to prove.

¶¶ 1, 6–15: Court held trial court properly refused Gomez's request that it instruct jurors that state must prove he knew his passenger was younger than 15.

9

28–1594 Authority to detain persons.

Duffy, 247 Ariz. 537, 453 P.3d 816 (Ct. App. 2019): Officer testified he saw Duffy commit three violations of Arizona traffic code: following another car at unsafely close distance; exceeding posted speed limit; and changing lanes in unsafe manner; Duffy claimed officer was not credible and thus the stop was unlawful.

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.010 A peace officer or duly authorized agent of a traffic enforcement agency may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of Title 28 and to serve a copy of the traffic complaint for an alleged civil or criminal violation of Title 28.

¶¶ 8–15: Court held observation of traffic offenses gave officer probable cause to stop Duffy; court held credibility was for trial court to determine

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28–1321(C) Implied consent— Person dead, unconscious, or otherwise incapacitated.

Havatone, 241 Ariz. 506, 389 P.3d 1251 (2017): Havatone drove his SUV into an oncoming vehicle on Route 66 northeast of Kingman. A DPS officer responded to the scene and approached Havatone, who said he was driving the SUV. The officer detected a "heavy odor" of alcohol emanating from Havatone. Havatone was airlifted to a Las Vegas hospital for treatment. Without seeking a warrant, the officer followed DPS policy and instructed DPS dispatch to request that Las Vegas police officers obtain a blood sample. Havatone was unconscious when the blood sample was taken. The sample showed a blood alcohol concentration of 0.212.

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.010 Blood may be taken from a dead, unconscious, or otherwise incapacitated person only if case-specific exigent circumstances exist.

.020 When police have probable cause to believe a suspect has committed a DUI, a nonconsensual blood draw is permissible if, under the totality of the circumstances, law enforcement officials reasonably determine they cannot obtain a warrant without a significant delay that would undermine the effectiveness of the testing.

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¶¶ 18–19: "Where police have probable cause to believe a suspect committed a DUI, a non-consensual blood draw from an unconscious person is constitutionally permissible if, under the totality of the circumstances, law enforcement officials reasonably determine that they cannot obtain a warrant without significant delay that would undermine the effectiveness of the testing. . . . The state expressly concedes that the record does not show exigent circumstances beyond the natural dissipation of alcohol in defendant's blood. Hence, the search violated the Fourth Amendment and the only issue is whether the good-faith exception to the exclusionary rule applies."

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***Mitchell v. Wisconsin,* 139 S. Ct. 2525 (2019).**

Justice ALITO, joined by THE CHIEF JUSTICE, Justice BREYER, and Justice KAVANAUGH:

Mitchell at 2532: Officer received report that Gerald Mitchell appeared to be very drunk and had driven off in a van. Jaeger found Mitchell wandering near a lake, stumbling and slurring his words, and barely able to stand without the support of two officers. Jaeger gave Mitchell a preliminary breath test, which registered a BAC level of 0.24% (three times legal limit). Jaeger arrested Mitchell for DUI and drove him to a police station for a more reliable breath test using better equipment (standard practice).

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On the way, Mitchell's condition continued to deteriorate so that, at the station, he was too lethargic even for a breath test. Jaeger therefore drove Mitchell to a nearby hospital for a blood test; Mitchell lost consciousness on the ride over and had to be wheeled in. Even so, Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of his blood showed that his BAC, about 90 minutes after his arrest, was 0.222%.

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Mitchell at 2531: Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. **In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant.** When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information.

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In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

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Mitchell at 2535: In [cases involving unconscious drivers], the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant.

Mitchell at 2537: Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

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Justice THOMAS, concurring in the judgment:

Mitchell at 2539: Today, the plurality adopts a difficult-to-administer rule: Exigent circumstances are generally present when police encounter a person suspected of drunk driving—except when they aren't. . . . Under [my proposed *per se*] rule, the natural metabolization of alcohol in the blood stream creates an exigency once police have probable cause to believe the driver is drunk, regardless of whether the driver is conscious.

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Justice SOTOMAYOR, with whom Justice GINSBURG and Justice KAGAN join, dissenting:

Mitchell at 2541: The plurality's decision rests on the false premise that today's holding is necessary to spare law enforcement from a choice between attending to emergency situations and securing evidence used to enforce state drunk-driving laws. Not so. To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb.

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But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant.

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Mitchell at 2549: In many cases, even when the suspect falls unconscious, police officers will have sufficient time to secure a warrant—meaning that the Fourth Amendment requires that they do so.

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Justice GORSUCH, dissenting:

Mitchell at 2551: We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented. Instead, it upholds Wisconsin's law on an entirely different ground—citing the exigent circumstances doctrine.

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While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question.

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28–1388(E) Blood and breath tests— Sample of blood, urine, or other bodily substance.

Diaz v. Van Wie, 245 Ariz. 235, 426 P.3d 1214 (Ct. App. 2018): Diaz was found in vehicle that had crashed; he was unresponsive and taken to hospital; hospital personnel drew blood for medical purposes and stored it securely; police were advised of fact that medical personnel had drawn blood from Diaz for medical purposes, and without attempting to obtain warrant, took custody of portion blood sample. Diaz contended blood test results should have been suppressed.

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.020 In blood-alcohol cases, the Fourth Amendment may be implicated at three stages: (1) the physical intrusion into the body to draw blood; (2) the exercise of control over and the testing of the blood sample; and (3) obtaining the results of the test; when the physical intrusion is conducted by treating medical personnel, independent of government action, the Fourth Amendment does not apply to that stage; in such circumstances, the Fourth Amendment is not triggered until the state takes custody of the existing blood sample, tests it, and receives test results.

¶ 8: Court held state failed to show exigent circumstances and ordered sample suppressed.

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Havatone, 246 Ariz. 573, 443 P.3d 970 (Ct. App. 2019).

.070 The exclusionary rule is a prudential doctrine invoked solely to deter future violations, thus when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the good-faith exception applies because the deterrence rationale loses much of its force, and the exclusionary does not apply.

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¶¶ 20–32: Court held conduct was governed by Nevada law; court noted that, at time of collision, Nevada "implied consent" statute permitted officers to obtain non-consensual blood draws from unconscious DUI suspects, thus under Nevada law, good-faith exception would apply to blood draw and suppression would not be warranted.

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